litigation.[328] This provision, added as part of the 1974 FOIA amendments, requires courts to engage in a two-step substantive inquiry: (1) Is the plaintiff eligible for an award of fees and/or costs? (2) If so, is the plaintiff entitled to it?[329] The award of fees is discretionary with the court, once the threshold of eligibility has been crossed.[330]

As a preliminary matter, it should be noted that 5 U.S.C. § 552(a)(4)(E) provides for the assessment of fees and costs reasonably incurred in litigating a case under the FOIA. Accordingly, under existing law, fees and other costs may not be awarded for services rendered at the administrative level.[331] Similarly, fees are not recoverable for services rendered in related rulemaking proceedings.[332]

The vast majority of courts have held that 5 U.S.C. § 552(a)(4)(E) does not authorize the award of fees to a pro se nonattorney.[333] Previously, only the Court

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[328] 5 U.S.C. § 552(a)(4)(E) (1994), as amended by Electronic Freedom of Information Act Amendments of 1996, 5 U.S.C.A. § 552 (West Supp. 1997).

[329] See, e.g., Tax Analysts v. United States Dep't of Justice, 965 F.2d 1092, 1093 (D.C. Cir. 1992); Church of Scientology v. United States Postal Serv., 700 F.2d 486, 489 (9th Cir. 1983).

[330] See, e.g., Anderson v. HHS, 80 F.3d 1500, 1504 (10th Cir. 1996) ("Assessment of attorney's fees in an FOIA case is discretionary with the district court."); Detroit Free Press, Inc. v. Department of Justice, 73 F.3d 93, 98 (6th Cir. 1996) ("We review the court's determination [to grant fees] for an abuse of discretion."); Young v. Director, CIA, No. 92-2561, slip op. at 4 (4th Cir. Aug. 10, 1993); Maynard v. CIA, 986 F.2d 547, 567 (1st Cir. 1993); Tax Analysts, 965 F.2d at 1094 ("sifting of [fee] criteria over the facts of a case is a matter of district court discretion"); Weisberg v. United States Dep't of Justice, 745 F.2d 1476, 1495 (D.C. Cir. 1984); Church of Scientology, 700 F.2d at 489.

[331] See Northwest Coalition for Alternatives to Pesticides v. Browner, 965 F. Supp. 69, 65 (D.D.C. 1997); Newport Aeronautical Sales v. Department of the Navy, No. 84-120, slip op. at 8 (D.D.C. Apr. 17, 1985); Associated Gen. Contractors v. EPA, 488 F. Supp. 861, 864 (D. Nev. 1980); cf. Kennedy v. Andrus, 459 F. Supp. 240, 244 (D.D.C. 1978) (no fees for services rendered at administrative level under Privacy Act of 1974), aff'd, 612 F.2d 586 (D.C. Cir. 1980) (unpublished table decision). But see Mahler v. IRS, No. 79-3238, slip op. at 1 (D.D.C. Mar. 28, 1980) (one-page order granting pro se plaintiff's unopposed motion for attorney fees for work done at administrative level).

[332] See Newport Aeronautical Sales, No. 84-120, slip op. at 8 (D.D.C. Apr. 17, 1985); see also Nichols v. Pierce, 740 F.2d 1249, 1252-54 (D.C. Cir. 1984) (no fees awarded where plaintiff was successful in APA rulemaking action in which FOIA had not been primarily relied upon).

[333] See, e.g., Carter v. VA, 780 F.2d 1479, 1481 (9th Cir. 1986); DeBold v. Stimson, 735 F.2d 1037, 1041-43 (7th Cir. 1984); Wolfel v. United States, 711 F.2d 66, 68 (6th Cir. 1983); Clarkson v. IRS, 678 F.2d 1368, 1371 (11th Cir.

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of Appeals for the District of Columbia Circuit had unqualifiedly approved the award of fees to pro se nonattorney litigants.[334] Following the Supreme Court's decision in Kay v. Ehrler,[335] however, the D.C. Circuit concluded in Benavides v. Bureau of Prisons,[336] that it was "constrained" to reverse its position. It observed that "absent congressional intent to the contrary, the Supreme Court believes that the word `attorney,' when used in the context of a fee-shifting statute, does not encompass a layperson proceeding on his own behalf."[337] In rejecting the plaintiff's contention that the "the fee provision in FOIA is designed principally to deter government noncompliance,"[338] the D.C. Circuit declared: "To the extent that the fee-shifting provision in FOIA helps deter violations of the law, that result is only a serendipitous by-product of encouraging aggrieved individuals to obtain an attorney."[339]

In the wake of Kay and Benavides, the scant residual authority approving attorney fees awards to a pro se plaintiff may be regarded as tenuous at best. An earlier decision of the Court of Appeals for the Second Circuit implicitly held open the possibility of an award of attorney fees to a pro se litigant, although affirming the district court's denial of fees in that particular case.[340] In a subsequent decision, however, the Second Circuit appeared to retreat from even

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[333](...continued)
1982); Cunningham v. FBI, 664 F.2d 383, 384-88 (3d Cir. 1981); Barrett v. Bureau of Customs, 651 F.2d 1087, 1089 (5th Cir. 1981); Crooker v. United States Dep't of Justice, 632 F.2d 916, 920-21 (1st Cir. 1980); Burke v. Department of Justice, 432 F. Supp. 251, 253 (D. Kan. 1976), aff'd, 559 F.2d 1182 (10th Cir. 1977); cf. Crooker v. EPA, 763 F.2d 16, 17 (1st Cir. 1985) (pro se FOIA plaintiff may not collect fees under Equal Access to Justice Act).

[334] See Cox v. United States Dep't of Justice, 601 F.2d 1, 5-6 (D.C. Cir. 1979); Holly v. Acree, 72 F.R.D. 115, 116 (D.D.C. 1976), aff'd sub nom. Holly v. Chasen, 569 F.2d 160 (D.C. Cir. 1977) (unpublished table decision).

[335] 499 U.S. 432, 438 (1991) (holding that 42 U.S.C. § 1988 (1994), a fee-shifting statute similar to FOIA, does not authorize payment of fees to pro se attorney litigants).

[336] 993 F.2d 257, 259 (D.C. Cir. 1993).

[337] Id.

[338] Id.; see also Sellers v. Bureau of Prisons, No. 93-5090, slip op. at 1 (D.C. Cir. July 27, 1993) (applying principle of Kay and Benavides to deny fees to prevailing pro se plaintiff in Privacy Act litigation).

[339] 993 F.2d at 260.

[340] Crooker v. United States Dep't of the Treasury, 634 F.2d 48, 49 (2d Cir. 1980).

this equivocal position.[341]

Although in its decision in Benavides the D.C. Circuit specifically refused to comment on the availability of fees to pro se plaintiffs who are attorneys,[342] it should be noted that in Kay v. Ehrler, the Supreme Court specifically ruled that even a pro se attorney is ineligible for a fee award under 42 U.S.C. § 1988,[343] implicitly endorsing a line of cases that had reached the same conclusion under the FOIA.[344] It is significant that in Kay v. Ehrler, the Supreme Court employed reasoning virtually identical to that of Falcone v. IRS,[345] a FOIA decision upon which the district court in Kay v. Ehrler had relied in originally denying pro se attorney fees.[346] Under the circumstances, it is reasonable to conclude that the Supreme Court's rationale in Kay v. Ehrler would preclude an award of fees to

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[341] Kuzma v. United States Postal Serv., 725 F.2d 16, 17 (2d Cir. 1984) (emphasizing that Crooker was limited decision in which court had merely "held out the possibility that a pro se litigant might be entitled to some fee award if he could show that he had foregone an opportunity to earn `regular income for a day or more in order to prepare and pursue a pro se suit'" (quoting Crooker, 634 F.2d at 49)).

[342] 993 F.2d at 260. But cf. Burka v. HHS, No. 92-2636, slip op. at 3 (D.D.C. Mar. 21, 1997) ("Although the Court in Benavides expressly reserved the issue of whether a pro se attorney would be treated differently, it is implicit from the analysis that no distinction can be made between pro se attorneys and other pro se plaintiffs for the purposes of recovering attorney's fees under FOIA.") (appeal pending).

[343] 499 U.S. at 437-38.

[344] See, e.g., Aronson v. HUD, 866 F.2d 1, 4-6 (1st Cir. 1989) (denying fee awards for pro se attorney); Rotondo v. FBI, No. 88-3035, slip. op. at 2 (6th Cir. Aug. 24, 1988) (same); Falcone v. IRS, 714 F.2d 646, 647-48 (6th Cir. 1983) (same); see also Burka, No. 92-2636, slip op. at 3 (D.D.C. Mar. 21, 1997) ("[C]onsidering the Supreme Court's direct holding in Kay that pro se attorneys are ineligible to recover attorney's fees under [42 U.S.C.] section 1988, it appears that an identical holding should apply with equal force here."). But see Cazalas v. United States Dep't of Justice, 709 F.2d 1051, 1055-57 (5th Cir. 1983) (granting fee awards for pro se attorney); Cuneo v. Rumsfeld, 553 F.2d 1360, 1366 (D.C. Cir. 1977) (same).

[345] 714 F.2d at 647-48.

[346] 499 U.S. at 434-38 & n.4; see Benavides, 993 F.2d at 260 ("In discussing Falcone, the Supreme Court in Kay says absolutely nothing to suggest that . . . considerations affecting the disposition of fee claims under FOIA and section 1988 should be viewed differently."); Ray v. United States Dep't of Justice, 856 F. Supp. 1576, 1581 (S.D. Fla. 1994) (same), aff'd, 87 F.3d 1250, 1251-52 (11th Cir. 1996); see also Burka, No. 92-2636, slip op. at 3 (D.D.C. Mar. 21, 1997) ("The decision in Falcone is persuasive.").

any pro se FOIA litigant.[347] The applicability of these principles to the FOIA is further buttressed by the Supreme Court's practice of construing similarly worded fee-shifting statutes "uniformly."[348]

Unsurprisingly, in post-Kay decisions courts have recognized the applicability of Kay to FOIA cases[349] and have consistently denied fees to pro se attorneys.[350] Indeed, one court readily declined to award fees for the services of a pro se attorney in a case in which he also hired counsel to represent him--though it did allow an award of fees to the hired counsel.[351] Additionally, that court found that the proscription against pro se attorney fees should be applied retroactive-

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[347] 499 U.S. at 438 (observing that "awards of counsel fees to pro se litigants--even if limited to those who are members of the bar--would create a disincentive to employ counsel" and that "policy of furthering the successful prosecution of meritorious claims is better served by a rule that creates an incentive to retain counsel in every such case").

[348] City of Burlington v. Dague, 505 U.S. 557, 562 (1992) ("[O]ur case law construing what is a `reasonable' fee applies uniformly to all [similar fee statutes].").

[349] See Ray, 87 F.3d at 1251 ("The fee shifting provisions of section 1988 and FOIA are substantially similar. . . . No difference in language dictates that the two statutes should be interpreted differently."); Graham v. United States Dep't of Defense, No. 96-1111, slip op. at 11 (D. Md. Nov. 13, 1996) ("[T]he Supreme Court's ruling in Kay strongly supports [d]efendant's position that the Court cannot award attorneys' fees under FOIA to pro se attorney plaintiffs."); Manos v. United States Dep't of the Air Force, 829 F. Supp. 1191, 1193 (N.D. Cal. 1993) ("Because substantially similar policies underlie the attorneys' fees provisions of FOIA and section 1988, Kay strongly supports a denial of fees under FOIA to pro se attorney plaintiffs."); accord Krikorian v. Department of State, No. 88-3419, slip op. at 1 (D.D.C. May 12, 1995) ("The court agrees with the holding of Manos . . . ."), aff'd on other grounds, No. 95-5216 (D.C. Cir. Feb. 6, 1996).

[350] See Ray, 87 F.3d at 1252 ("So we believe the principles announced in Kay apply with equal force in this case to preclude the award of attorney's fees Ray seeks for his own work."); Manos, 829 F. Supp. at 1193 (recognizing prior split in circuits and even between district courts within Ninth Circuit regarding pro se attorney fee awards, but adopting blanket prohibition against such awards in light of Kay); accord Krikorian, No. 88-3419, slip op. at 1 (D.D.C. May 12, 1995).

[351] Ray, 856 F. Supp. at 1582 ("The ruling for which Plaintiff argues would allow attorney plaintiffs to circumvent Kay by merely hiring an attorney, regardless of whether it was the plaintiff or the hired attorney who actually handled the case. Such a rule would not ensure that an objective attorney handled the case."); see also Goulding v. IRS, No. 94 C 5113, 1997 WL 47450, at *5 (N.D. Ill. Jan. 20, 1997) (denying attorney fees to disbarred attorney), appeal voluntarily dismissed, No. 97-1322 (D.C. Cir. Mar. 18, 1997).

ly.[352] In another case, fees were also denied to an attorney who prosecuted a suit solely in his own name and who identified himself as "pro se,"[353] but who subsequently asserted that he was representing a client only when he filed an application for fees.[354] That court similarly denied fees for the services of "associates and `colleagues' who worked for and with [the plaintiff],"[355] but who never entered an appearance and who were merely identified in court filings as "of counsel."[356] In contrast to the prohibition against pro se fees, however, it has been firmly held that a state is eligible to recover attorney fees under the FOIA.[357]

Unlike with attorney fees, the law is settled that costs of litigation can be reasonably incurred by, and awarded to, even a pro se litigant who is not an attorney.[358] Additionally, pursuant to 28 U.S.C. § 1920,[359] costs may be awarded entirely independently of the FOIA's fee and cost criteria.[360] As the D.C. Circuit has noted, "[t]he fixing of costs, if any, is handled routinely under 28 U.S.C.

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[352] Ray, 856 F. Supp. at 1582.

[353] Burka, No. 92-2636, slip op. at 1-2 & n.1 (D.D.C. Mar. 21, 1997).

[354] Id. at 3-4 & n.3 ("Indeed, it would be highly incongruous for the law to allow Burka to maintain anonymity for his undisclosed client and, at the same time, raise the existence of that client as a sword in support of his motion for attorneys' fees.").

[355] Id. at 4-5 ("`[T]he word "attorney" assumes an agency relationship, and it seems likely that Congress contemplated an attorney-client relationship as the predicate for an award under [the attorneys' fees provision].'" (quoting Kay, 499 U.S. at 435-36)).

[356] Id. at 1-2 n.1.

[357] See, e.g., Texas v. ICC, 935 F.2d 728, 734 (5th Cir. 1991); Assembly of Cal. v. United States Dep't of Commerce, No. Civ-S-91-990, slip op. at 13-14 (E.D. Cal. May 28, 1993) ("Although the Assembly may have more resources than some private citizens, this does not mean the Assembly is any less restricted with respect to allocating its resources.").

[358] See Carter, 780 F.2d at 1481-82; DeBold, 735 F.2d at 1043; Clarkson, 678 F.2d at 1371; Crooker, 632 F.2d at 921-22; see also Trenerry v. United States Dep't of the Treasury, No. 92-5053, slip op. at 10-12 (10th Cir. Feb. 5, 1993).

[359] (1994).

[360] See Four Corners Action Coalition v. United States Dep't of the Interior, No. 92-Z-2106, slip op. at 4 (D. Colo. Jan. 4, 1994) (FOIA provides specifically for award of costs, independently of general provision contained in 28 U.S.C. § 1920); see also Ray, 856 F. Supp. at 1585 (granting costs under § 1920 for expert witness fees relating to issue on which plaintiff did not substantially prevail, but limiting them to $40-per-day amount provided as costs by 28 U.S.C. § 1821(b) (1994)).

§ 1920."[361] "Costs" in a FOIA case have also been interpreted to include the fees paid to a special master appointed by the court to review documents on its behalf.[362] However, a plaintiff cannot seek to have work done by an attorney compensated under the guise of "costs."[363] Of course, if it prevails, even the government may recover its costs pursuant to Rule 54(d) of the Federal Rules of Civil Procedure, although such recoveries are uncommon.[364]

To be eligible for a fee award, the plaintiff must "substantially prevail" within the meaning of 5 U.S.C. § 552(a)(4)(E). The determination of whether the plaintiff has substantially prevailed is "largely a question of causation."[365] Though a court order compelling disclosure is not a condition precedent to an award of fees, the plaintiff must prove that prosecution of the suit was reasonably necessary to obtain the requested records and that a causal nexus existed between the suit and the agency's disclosure of the records.[366] The mere filing of the lawsuit and the subsequent release of records does not necessarily mean that the

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[361] Gregory v. FDIC, 631 F.2d 896, 900 n.8 (D.C. Cir. 1980); see also Kuzma v. IRS, 821 F.2d 930, 931-34 (2d Cir. 1987) (finding that reimbursable costs included photocopying, postage, typing, parking, and transportation expenses, in addition to filing costs and marshal's fees paid at trial level).

[362] See Washington Post v. DOD, 789 F. Supp. 423, 424 (D.D.C. 1992) (apportioning master's fees equally between plaintiff and government).

[363] See Anderson, 80 F.3d at 1508.

[364] See, e.g., Donohue v. United States Dep't of Justice No. 84-3451, slip op. at 1-2 (D.D.C. Mar. 7, 1988) (granting government's bill of costs for reimbursement of reporter, witness, and deposition expenses); see also Baez v. United States Dep't of Justice, 684 F.2d 999, 1005-06 (D.C. Cir. 1982) (en banc) (assessing costs of appeal against unsuccessful plaintiff); cf. Goldgar v. Office of Admin., 26 F.3d 32, 36 (5th Cir. 1994) (threatening to assess costs, among other sanctions, against plaintiff for future filing of any FOIA complaint that is "without jurisdictional basis").

[365] Weisberg, 745 F.2d at 1496; Church of Scientology v. Harris, 653 F.2d 584, 587 (D.C. Cir. 1981).

[366] See, e.g., Maynard, 986 F.2d at 568; Cox, 601 F.2d at 6 (citing Vermont Low Income Advocacy Council, Inc. v. Usery, 546 F.2d 509, 513 (2d Cir. 1976)); Cuneo, 553 F.2d at 1366; cf. Transit Performance Eng'g v. Department of Transp., No. 92-722, slip op. at 4 (D.D.C. June 26, 1992) (no causation when "undisputed evidence [showed] that the officials who decided to release the documents were not even aware that a lawsuit had been filed until after the requested documents were released"); National Wildlife Fed'n v. Department of the Interior, No. 83-3586, slip op. at 9-12 (D.D.C. Aug. 19, 1988) (fees denied when plaintiffs failed to prove that suit played "catalytic role" in prompting Congress to amend FOIA fee waiver provision).

plaintiff substantially prevailed.[367] Indeed, eligibility for a fee award may be lacking when the plaintiff could reasonably have obtained the same information through other means,[368] or when the release resulted from events independent of the lawsuit,[369] or when it was due to routine, though delayed, administrative

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[367] See Maynard, 986 F.2d at 568 (production of documents by two agencies after suit filed held "not determinative" as to causation); Weisberg, 745 F.2d at 1496; Frye v. EPA, No. 90-3041, slip op. at 8 (D.D.C. Aug. 31, 1992) ("while plaintiff's lawsuit appears to have served as a catalyst for EPA's eventual disclosures, it is not at all clear that it was the cause" of EPA's voluntary disclosure); see also Gray v. USDA, No. 91-1383, slip op. at 3 (D.D.C. Mar. 27, 1992) (agency's granting of fee waiver on administrative appeal after plaintiff "precipitously filed" court complaint--involving "new and time-consuming issue" in context of "blunderbuss request"--held insufficient to establish plaintiff as prevailing party). But see Ajluni v. FBI, 947 F. Supp. 599, 609 (N.D.N.Y. 1996) ("Given the FBI's foot-dragging approach in responding to plaintiff's requests, and the additional and significant material released only after the Magistrate Judge ordered the FBI to produce a Vaughn Index, plaintiff has shown that this lawsuit was reasonably necessary, and that a sufficient causal connection existed between the initiation of the lawsuit and the FBI's release of a substantial number of documents.").

[368] See, e.g., Murty v. OPM, 707 F.2d 815, 816 (4th Cir. 1983) ("telephone call of inquiry as to what had happened to his request . . . would have produced the same result as the law suit"); Palmer v. Sullivan, No. H-C-91-13, slip op. at 3 (E.D. Ark. July 8, 1991) (fees denied when "telephone call or follow-up letter could easily have avoided this lawsuit"); Mendez-Suarez v. Veles, 698 F. Supp. 905, 907 (N.D. Ga. 1988) (fees denied when "the pendency of the discovery requests conclusively demonstrates that the information sought was available through means other than the filing of a FOIA claim"); see also Nicolau v. United States Dep't of Justice, 699 F. Supp. 1063, 1066 (S.D.N.Y. 1988) (fees denied when "no reason to believe that the suit was necessary for the actions of the [agency;] . . . [i]ndeed, it is not even clear that those individuals in the [agency] were aware of the suit at the time the documents were turned over").

[369] See, e.g., Ostrer v. FBI, No. 83-0328, slip op. at 12 (D.C. Cir. Jan. 19, 1988) (no causation when release of records was due to change in factual circumstances during course of litigation); Pyramid Lake Paiute Tribe of Indians v. United States Dep't of Justice, 750 F.2d 117, 119-21 (D.C. Cir. 1984) (release by senator of his letter to Attorney General held not caused by filing of FOIA suit); Public Law Educ. Inst. v. United States Dep't of Justice, 744 F.2d 181, 183-84 (D.C. Cir. 1984) (no causation when government exercised its discretion to release requested document in unrelated, non-FOIA suit); Chilivis v. SEC, 673 F.2d 1205, 1212 (11th Cir. 1982) (disclosure resulted from termination of investigation and consequent expiration of Exemption 7(A) protection); Nationwide Bldg. Maintenance, Inc. v. Sampson, 559 F.2d 704, 712 n.34 (D.C. Cir. 1977) ("[W]here the government can show that information disclosed after initial resistance was nonetheless exempt from the FOIA a plaintiff should not be awarded attorney fees."); Abernethy v. IRS, 909 F. Supp. 1562, 1569 (N.D. Ga. 1995) (no

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processing.[370] Of course, if a requester unconditional

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[369](...continued)
causation when records were disclosed only after they had already been provided to plaintiff through discovery in unrelated civil actions), aff'd, No. 95-9489 (11th Cir. Feb. 13, 1997); Ray v. United States Dep't of Justice, No. 92-0031, slip op. at 3 (S.D. Fla. Aug. 9, 1995) ("[B]ecause the requested information was released as a result of a ruling in a separate action, this lawsuit did not provide the necessary impetus for disclosure."), aff'd, No. 95-5448 (11th Cir. Dec. 17, 1996); Pfeiffer v. CIA, No. 87-1279, slip op. at 2-3 (D.D.C. Oct. 23, 1991) ("[P]ermitting attorneys' fees for the voluntary release of exempt material would have a chilling effect."). But cf. McDonnell v. United States, 870 F. Supp. 576, 583-84 (D.N.J. 1994) (causation found when plaintiff challenged government's longstanding withholding practice and entirely separate case contemporaneously proceeding through judicial system ultimately resulted in Supreme Court modification of government's stance and yielded additional disclosures to plaintiff); Phoenix Newspapers, Inc. v. FBI, No. 86-1199, slip op. at 4-5 (D. Ariz. Dec. 12, 1987) (that plaintiffs acquired documents independently does not preclude them from substantially prevailing; a "contrary determination is inconceivable as the government would be able to foreclose the recovery of attorney's fees whenever it chose to moot an action" by releasing records after denying disclosure at administrative level).

[370] See, e.g., Van Strum v. EPA, No. 91-35404, slip op. at 5 (9th Cir. Aug. 17, 1992) (no causation where, in litigation, agency disclosed 18,000 pages within two months after narrowing of request); Weisberg v. United States Dep't of Justice, 848 F.2d 1265, 1268-71 (D.C. Cir. 1988) (no causation when majority of records were released as result of administrative processing and not suits); Church of Scientology, 700 F.2d at 491 (plaintiff does not substantially prevail when "an unavoidable delay accompanied by due diligence in the administrative process, rather than the threat of an adverse court order, was the actual reason for the agency's failure to respond to a request"); Kuffel v. United States Bureau of Prisons, 882 F. Supp. 1116, 1127 (D.D.C. 1995) ("release of records was due to routine administrative processing that was done in good faith and with due diligence"); Arevalo-Franco v. INS, 772 F. Supp. 959, 961 (W.D. Tex. 1991) (requesters "generally" held not to have substantially prevailed when they "know that administrative problems are causing the delay . . . and file lawsuits anyway"); Alliance for Responsible CFC Policy, Inc. v. Costle, 631 F. Supp. 1469, 1470 (D.D.C. 1986) (fees denied when agency's "failure to disclose in timely fashion appears to be `an unavoidable delay accompanied by due diligence in the administrative processes' and not the result of agency intransigence" (quoting Cox, 601 F.2d at 6)); Lovell v. Department of Justice, 589 F. Supp. 150, 153-54 (D.D.C. 1984) (fees denied even though plaintiff waited three years before filing suit and records were released only several months thereafter); Simon v. United States, 587 F. Supp. 1029, 1032 (D.D.C. 1984) (fees denied where "routine administrative inertia or unavoidable delay in identifying and assembling the information requested was the reason for defendants' belated compliance"). But see City of Detroit v. United States Dep't of State, No. 93-CV-72310, slip op. at 2-3 (E.D. Mich. Mar. 24, 1995) (requester substantially prevailed when litigation

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ly waives his right to fees as part of a settlement, he cannot go back on his agreement.[371]

As federal agencies are now strongly urged to make discretionary disclosures of exempt information whenever possible, as a matter of new FOIA policy,[372] courts will likely be required to consider the significance of such disclosures in litigation regarding attorney fee claims. When a discretionary disclosure is made, a court should find that it was caused not by the institution of litigation, but rather that it resulted from a discretionary, policy-governed

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[370](...continued)
resulted in release of documents at least six months earlier than anticipated); Northwest Coalition for Alternatives to Pesticides v. Reilly, No. 90-707, slip op. at 2-4 (D.D.C. May 28, 1992) (government's claim that disclosure was made in course of "administrative processing" rejected where agency failed to respond to plaintiff's letters of administrative appeal); Church of Scientology v. IRS, 769 F. Supp. 328, 330 (C.D. Cal. 1991) (notwithstanding agency appeal backlog, plaintiff eligible when government denied documents initially, had yet to respond to administrative appeal, and released documents only following order to produce Vaughn Index); Muffoletto v. Sessions, 760 F. Supp. 268, 274 (E.D.N.Y. 1991) (lawsuit provided "impetus" for FBI to act, "even if simply to negotiate . . . in a more expeditious manner"); Harrison Bros. Meat Packing Co. v. USDA, 640 F. Supp. 402, 405-06 (M.D. Pa. 1986) (holding it "ludicrous" for government, after "suddenly and inexplicably" releasing records, to assert mootness to avoid paying fees after having denied disclosure at administrative level); Des Moines Register & Tribune Co. v. United States Dep't of Justice, 563 F. Supp. 82, 85 (D.D.C. 1983) (delay of over three years from submission of request to date records were released held not reasonable).

[371] See National Senior Citizens Law Ctr. v. Social Sec. Admin., 849 F.2d 401, 402-03 (9th Cir. 1988); Krikorian v. Department of State, No. 95-5216, slip op. at 1 (D.C. Cir. Feb. 6, 1996) (rejecting "appellant's proposed extrinsic evidence that the Stipulation of Dismissal was intended to condition dismissal on the payment of attorney's fees"). But see Fitzgibbon v. Agency for Int'l Dev., No. 87-1548, slip op. at 2-3 (D.D.C. Mar. 26, 1992) (in FOIA context, stipulation in which plaintiff renounces any claim for "costs or fees" precludes claims for court costs only and does not waive plaintiff's right to seek attorney's fees).

[372] See Attorney General's Memorandum for Heads of Departments and Agencies regarding the Freedom of Information Act (Oct. 4, 1993), reprinted in FOIA Update, Summer/Fall 1993, at 4-5 (FOIA personnel "strongly encourage[d]" to make discretionary disclosures); see also FOIA Update, Spring 1997, at 1 (describing Attorney General's reiteration of importance of "foreseeable harm" standard to federal agencies in order to promote further discretionary disclosure in agency decisionmaking); President's Memorandum for Heads of Departments and Agencies regarding the Freedom of Information Act, 29 Weekly Comp. Pres. Doc. 1999 (Oct. 4, 1993), reprinted in FOIA Update, Summer/Fall 1993, at 3 (establishing policy of greater "[o]penness in government").

motivation.[373] Indeed, in the analytically comparable context of determining whether an agency's withholding was reasonable (under the entitlement factor), one court has perceptively identified the dangers of assessing fees where the agency disclosure is truly voluntary.[374] The Court of Appeals for the Sixth Circuit explained:

> Were the courts to construe disclosure of a document as an agency's concession of wrongful withholding, as did the District Court here, agencies would be forced to either never disclose a document once withheld or risk being assessed fees. This result would frustrate the policy of encouraging disclosure that prompted enactment of the FOIA and its amendments. . . . Penalizing an agency for disclosure at any stage of the proceedings is simply not in the spirit of the FOIA.[375]

In reviewing attorney fees claims in connection with discretionary disclosure, courts may find it appropriate to examine whether the information so disclosed would, in fact, have been found exempt--a practice courts have routinely undertaken in the past when agencies have argued that changed circum-

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[373] See, e.g., Lovell v. Alderete, 630 F.2d 428, 432 & n.4 (5th Cir. 1980) (alternative holding) ("[The] Government's compliance with [plaintiff's] request was not caused mainly by the institution of the suit, but rather was also affected by a change in the United States Attorney General's [May 5, 1977] guidelines concerning disclosure of exempted materials."); see also Nationwide Bldg. Maintenance, Inc. v. Sampson, 559 F.2d 704, 712 n.34 (D.C. Cir. 1977) (when delay in disclosure was due to agency's consideration of appropriateness of discretionary disclosure, "FOIA should not be construed so as to put the federal bureaucracy in a defensive or hostile position with respect to the Act's spirit of open government and liberal disclosure of information"); cf. Bubar v. FBI, 3 Gov't Disclosure Serv. (P-H) ¶ 83,218, at 89,930-31 (D.D.C. June 13, 1983) (disclosure caused by administrative reprocessing of request "pursuant to newly-adopted procedures"). But see O'Neill, Lysaght & Sun v. DEA, 951 F. Supp. 1413, 1423 (C.D. Cal. 1996) ("That the suit was pending at the time of the new directives is the reason the request was eligible for reevaluation."); McDonnell, 870 F. Supp. at 583-84 (aberrationally reasoning that had plaintiff not been in litigation for more than five years, his suit would not have been pending when Attorney General instituted new FOIA policy encouraging discretionary disclosure).

[374] American Commercial Barge Lines v. NLRB, 758 F.2d 1109, 1112 (6th Cir. 1985) ("It clearly would not be inconsistent with the FOIA for an agency to initially withhold an exempt document and later disclose it after determining that disclosure was in the public interest even though the document was exempt. Disclosure therefore does not establish that the agency considers a document non-exempt.").

[375] Id.

stances and not the institution of litigation caused the disclosure.[376] Of course, courts might view discretionary disclosures in litigation with some degree of skepticism--which only underscores the importance of fully evaluating records for discretionary action at the administrative level.[377]

A requester may also be deemed not to have substantially prevailed where the records disclosed were "not significant in terms of the overall FOIA request."[378] Considering a contention that an agency's release of documents was so

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[376] See, e.g., Chesapeake Bay Found., Inc. v. USDA, 11 F.3d 211, 216 (D.C. Cir. 1993) (When, following disclosure in litigation, "the Government continues to insist that it had a valid basis for withholding requested documents, the District Court must determine whether the Government's position is legally correct in assessing a claim for fees under FOIA."); Anderson v. HHS, 3 F.3d 1383, 1385 (10th Cir. 1993) (when agency's disclosure moots FOIA action, "the court may (and must) refer to the merits of the underlying FOIA action in determining whether [plaintiff] is entitled to fees" (citing Aviation Data Serv. v. FAA, 687 F.2d 1319, 1322-24 (10th Cir. 1982))); Lovell, 630 F.2d at 430-34; Nationwide Bldg., 559 F.2d at 712 n.34 ("Certainly where the government can show that information disclosed after initial resistance was nonetheless exempt from the FOIA a plaintiff should not be awarded attorney fees . . . ."); see also Polynesian Cultural Ctr. v. NLRB, 600 F.2d 1327, 1330 (9th Cir. 1979) (per curiam) (concluding, despite court-ordered disclosure, that "[t]he Board's claim of exemption was not only reasonable, but correct," based upon subsequent Supreme Court decision).

[377] See Seegull Mfg. Co. v. NLRB, 741 F.2d 882, 885 (6th Cir. 1984) (assertion of voluntary disclosure for documents previously claimed absolutely privileged, made six months after close of enforcement proceeding and after suit had been filed, rejected); O'Neill, 951 F. Supp. at 1423 ("discretionary" disclosure claim by agency rejected when it "had contested the disclosure of these documents up to the point where it was evident that it would be ordered to disclose"); Ajluni, 947 F. Supp. at 610 (rejecting agency's assertion that supplemental disclosure resulted, in part, from liberalized disclosure policies when release was made only after agency was ordered to produce Vaughn Index and its assertions were "nowhere supported, illustrated or indexed with reference to the released materials"); Education-Instruccion, Inc. v. HUD, 87 F.R.D. 112, 115 (D. Mass. 1980) (rejecting claim that disclosure was due to expiration of pending investigation, where investigation was completed 13 months before disclosure was made in litigation), aff'd, 649 F.2d 4 (1st Cir. 1981); accord FOIA Update, Summer/Fall 1993, at 1, 4 (emphasizing importance of making discretionary disclosures at administrative level).

[378] Weisberg, 848 F.2d at 1270-71; see Maynard, 986 F.2d at 568 (court-ordered "disclosure of a single name was of minimal importance when compared with plaintiff's overall FOIA request"); Wayland v. NLRB, No. 3-85-553, slip op. at 3 (M.D. Tenn. May 19, 1986); Nuclear Control Inst. v. NRC, 595 F. Supp. 923, 926 (D.D.C. 1984); Braintree Elec. Light Dep't v. Department of Energy, 494 F. Supp. 287, 291 (D.D.C. 1980). But see Church of Scientology, 653 F.2d at 589

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de minimis as to preclude an award of attorney fees, the D.C. Circuit has stated that the "sheer volume of [a] release is not determinative," but remanded the case for the trial court to "explain why it believes the release of eleven pages [out of the 1500 pages at issue] is of such substance and quality as to make [plaintiff] eligible for an attorney's fee award."[379]

On the other hand, in some instances, a plaintiff might be deemed to have substantially prevailed even if no records are released. For example, if the lawsuit results in a fee waiver,[380] in a new search locating additional records,[381] in expedited processing,[382] or in a significant change in the agency's FOIA policies or practices,[383] the plaintiff might be deemed eligible for a fee award. Of course,

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[378](...continued)
("no reason in law or logic to discount significance of" 108 envelopes and transmittal slips).

[379] Union of Concerned Scientists v. NRC, 824 F.2d 1219, 1226 (D.C. Cir. 1987); see also Pacific Energy Inst. v. IRS, No. 94-36172, 1996 WL 14244, at *1 (9th Cir. Jan. 16, 1996) (finding plaintiff did not "substantially prevail" because it "obtained only five of 80 documents it sought, and none that was particularly noteworthy"); McTigue v. United States Dep't of Justice, No. 84-3583, slip op. at 5 (D.D.C. Aug. 20, 1987) ("While it is true that a court must assess the quality of information released as well as the volume, the information obtained in this action was scant under either standard.") (citation omitted).

[380] See, e.g., Wilson v. United States Dep't of Justice, No. 87-2415, slip op. at 2 (D.D.C. Sept. 12, 1989), appeal dismissed, No. 89-5206 (D.C. Cir. Mar. 9, 1990); Ettlinger v. FBI, 596 F. Supp. 867, 879-82 (D. Mass. 1984).

[381] See National Pizza Co. v. INS, No. 94-2972, slip op. at 1-2 (W.D. Tenn. Aug. 29, 1995) (inexplicable decision granting commercial requester 20% of fees claimed).

[382] See Exner v. FBI, 443 F. Supp. 1349, 1353 (S.D. Cal. 1978) (primary basis for awarding fees was plaintiff's success in obtaining court-ordered expedited processing), aff'd, 612 F.2d 1202 (9th Cir. 1980).

[383] See, e.g., Halperin v. Department of State, 565 F.2d 699, 706 n.11 (D.C. Cir. 1977) (suit caused agency to revise its manner of recording "off-the-record" briefings, even though litigation caused no records to be disclosed); Washington Post, 789 F. Supp. at 425 (plaintiff "substantially prevailed" where government produced several key documents and "has undertaken to reexamine 2000 more that had been previously withheld"); Birkland v. Rotary Plaza, Inc., 643 F. Supp. 223, 225-26 (N.D. Cal. 1986) (suit necessary to force agency to comply with FOIA's subsection (a)(1) requirements) (jurisdiction subsequently questioned); Bollen v. Smith, No. 82-2424, slip op. at 3-4 (W.D. Pa. May 27, 1983) (suit found necessary to force FBI to admit it had no records; during administrative process it had refused to confirm or deny the existence of the requested records); see also Crooker v. United States Parole Comm'n, 776 F.2d 366, 367 (1st Cir. 1985) (suit ultimately resulted in disclosure of records by causing Solicitor General to
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the benefit to the plaintiff must result from a favorable action taken by the agency that involves one of its obligations under the FOIA.[384]

Even if a plaintiff satisfies the eligibility test, a court still must exercise its equitable discretion in separately determining whether that plaintiff is entitled to an award.[385] This discretion is ordinarily guided by four criteria: (l) the public benefit derived from the case; (2) the commercial benefit to the complainant; (3) the nature of the complainant's interest in the records sought; and (4) whether the government's withholding had a reasonable basis in law.[386] "Because these factors are intended to foster multiple congressional goals, no single factor is dispositive."[387] It should be noted that these four entitlement factors have nothing to do with determining an appropriate fee amount and, as such, they cannot be considered in that entirely separate analysis.[388] Thus, it is not enough merely that a plaintiff demonstrate eligibility by substantially prevailing; he must also prove entitlement.[389]

While any FOIA disclosure hypothetically benefits the public by generally

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[383](...continued)
abandon prior position that presentence reports were not "agency records" subject to FOIA). But cf. Hendricks v. United States Dep't of Justice, No. 92-5621, slip op. at 2 (E.D. Pa. July 29, 1993) (in absence of agency bad faith, plaintiff did not "substantially prevail" where filing suit clarified that records agency previously "withheld" did not in fact exist).

[384] See Wrenn v. Department of the Treasury, 866 F. Supp. 525, 526-27 (N.D. Ala. 1994) (rejecting plaintiff's "novel claim" that he had satisfied "substantially prevailed" criteria because IRS withdrew its claim of unpaid taxes following its FOIA response acknowledging that there were no records documenting its grounds for that claim).

[385] See Young, No. 92-2561, slip op. at 4 (4th Cir. Aug. 10, 1993) ("Even if a plaintiff substantially prevails, however, a district court may nevertheless, in its discretion, deny the fees."); Texas, 935 F.2d at 733 ("The district court did not specify which of the criteria [plaintiff] failed to satisfy. But so long as the record supports the court's exercise of discretion, the decision will stand.").

[386] See Detroit Free Press, 73 F.3d at 98; Cotton v. Heyman, 63 F.3d 1115, 1117 (D.C. Cir. 1995); Tax Analysts, 965 F.2d at 1093; Church of Scientology, 700 F.2d at 492; Fenster v. Brown, 617 F.2d 740, 742-45 (D.C. Cir. 1979); Cuneo, 553 F.2d at 1364-66.

[387] Republic of New Afrika v. FBI, No. 78-1721, slip op. at 2 (D.D.C. Apr. 29, 1987) (denying plaintiff's motion for reconsideration); see, e.g., Weisker v. United States Dep't of Justice, No. S-89-543, slip op. at 11-17 (E.D. Cal. Mar. 7, 1990) ("balancing" of all four factors held to be proper approach).

[388] See Long v. IRS, 932 F.2d 1309, 1315-16 (9th Cir. 1991).

[389] See Cotton, 63 F.3d at 1120 (distinguishing Halperin, 565 F.2d at 706 n.11).

increasing public knowledge about the government, it has been held that this "broadly defined benefit" is not what Congress had in mind when it provided for awards of attorney fees.[390] Rather, the "public benefit" factor "`"speaks for an award [of attorney fees] when the complainant's victory is likely to add to the fund of information that citizens may use in making vital political choices."'"[391] Such a determination necessarily entails an evaluation of the nature of the specific information disclosed.[392]

Thus, it has been held that "[m]erely incidental or inevitable public benefits of disclosure from a FOIA suit . . . will not automatically satisfy [the requirement of subsection (a)(4)(E)]"[393] and that it is similarly unavailing to show simply that the prosecution of the suit has compelled an agency to improve the efficiency of

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[390] Id. (citing Fenster, 617 F.2d at 744)

[391] Id. (quoting Fenster, 617 F.2d at 744 (quoting, in turn, Blue v. Bureau of Prisons, 570 F.2d 529, 534 (5th Cir. 1978))).

[392] See id.

[393] Guam Contractors Ass'n v. United States Dep't of Labor, 570 F. Supp. 163, 168 (N.D. Cal. 1983); see Ellis v. United States, 941 F. Supp. 1068, 1078 (D. Utah 1996) ("[T]he successful FOIA plaintiff always achieves some degree of public benefit by bringing the government into compliance with FOIA and by the benefit assumed to flow from public disclosure of government information."); Bangor Hydro-Electric Co. v. United States Dep't of the Interior, 903 F. Supp. 169, 171 (D. Me. 1995) ("[B]y definition a successful FOIA plaintiff always confers some degree of benefit on the public by . . . securing for society the benefits assumed to flow from the disclosure of government information. That general benefit alone, however, does not necessarily support an award of litigation costs and attorney fees."); see also Texas, 935 F.2d at 733-34 ("little public benefit" in disclosure of documents that fail to reflect agency wrongdoing; "Texas went fishing for bass and landed an old shoe. Under the circumstances, we decline to require the federal government to pay the cost of tackle."); Aviation Data, 687 F.2d at 1319 ("[W]here plaintiff seeks disclosure of material for commercial purposes, attorney fees may be awarded only on a positive and clear showing of substantial public benefit. Minimal, incidental and speculative public benefit will not suffice."); Mendez-Suarez, 698 F. Supp. at 908 ("[Though] the treatment of Cubans at the Atlanta penitentiary is a matter of public concern [it] is by no means certain . . . that significant public benefit inures from disclosure of information concerning an incident between inmates at the penitentiary."); Brainerd v. Department of the Navy, No. 87-C-4057, slip op. at 6 (N.D. Ill. Apr. 21, 1988) ("[Though] disclosure of the requested information could conceivably benefit the plaintiff's co-workers . . . , this does not strike the Court as the kind of disclosure which FOIA was intended to facilitate."). But see Aronson, 866 F.2d at 3 (public interest served by disclosure to "private tracer" of information concerning mortgagors who were owed "distributive share" refunds); Landano v. United States Dep't of Justice, 873 F. Supp. 884, 892 (D.N.J. 1994) ("Here, the public clearly benefits from this disclosure since it has an interest in the fair and just administration of the criminal justice system as [applied to the plaintiff].").

its FOIA processing.[394]

Similarly, it has been held by the D.C. Circuit that "public benefit" should not be grounded solely on "the potential release of present and future information" resulting from the legal precedent set by the case in which fees are sought.[395] As the D.C. Circuit perceptively noted in one case: "Such an inherently speculative observation is . . . inconsistent with the structure of FOIA itself."[396] However, this view has not always been applied.[397] On the other hand, "the degree of dissemination and likely public impact that might be expected from a particular disclosure" is a highly pertinent consideration.[398] When the information released is already in the public domain, this factor does not weigh in favor of a fee award.[399]

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[394] See Solone v. IRS, 830 F. Supp. 1141, 1143 (N.D. Ill. 1993) ("While the public would benefit from the court's imprimatur to the IRS to comply voluntarily with the provisions of the FOIA, this is not the type of benefit that FOIA attorneys' fees were intended to generate."); Muffoletto, 760 F. Supp. at 277 (public benefit in compelling FBI to act more expeditiously is insufficient).

[395] Cotton, 63 F.3d at 1120 (fees sought on ground that plaintiff had obtained district court ruling that Smithsonian Institution is "agency" subject to FOIA); see Chesapeake Bay Found. v. Department of Agric., 108 F.3d 375, 377 (D.C. Cir. 1997) ("Nor is the establishment of a legal right to information a public benefit for the purpose of awarding attorneys' fees." (citing Cotton, 63 F.3d at 1120)); see also Bangor Hydro-Electric, 903 F. Supp. at 170 (rejecting argument that public benefitted by precedent which would "allow other utilities to easily acquire similar documents for the benefit of those utilities ratepayers").

[396] Cotton, 63 F.3d at 1120.

[397] See Church of Scientology, 700 F.2d at 493 (appellate ruling that specific statutory provision does not qualify under Exemption 3 "in our view, benefits the public"); Aronson, 866 F.2d at 3 (public interest served by disclosure to "private tracer" of information concerning mortgagors who were owed "distributive share" refunds); Landano, 873 F. Supp. at 892 ("the public benefits from the Supreme Court's guidelines which permit much easier access to government-held information").

[398] Blue, 570 F.2d at 533; Church of Scientology, 769 F. Supp. at 331 (recognizing public interest in "the apparently improper designation of a religion as a `tax shelter' project"); see Republic of New Afrika v. FBI, 645 F. Supp. 117, 121 (D.D.C. 1986); Polynesian Cultural Ctr., 600 F.2d at 1330 (fees denied where "disclosure was unlikely to result in widespread dissemination, or substantial public benefit"); Frydman v. Department of Justice, 852 F. Supp. 1497, 1503 (D. Kan. 1994) (requester's suggestion that he might write book "too speculative to warrant much weight"), aff'd, 57 F.3d 1080 (10th Cir. 1995) (unpublished table decision).

[399] See, e.g., Tax Analysts, 965 F.2d at 1094 (district court did not abuse its discretion in finding that more prompt reporting by Tax Analysts of additional

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The second factor requires an examination of whether the plaintiff had an adequate private commercial incentive to litigate its FOIA demand even in the absence of an award of attorney fees.[400] The third factor, often evaluated in tandem with the second factor, militates against awarding fees in cases where the plaintiff had an adequate personal incentive to seek judicial relief.[401] In

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[399](...continued)
25% of publicly available district court tax decisions was "less than overwhelming" contribution to public interest); Petroleum Info. Corp. v. United States Dep't of the Interior, No. 89-3173, slip op. at 5-6 (D.D.C. Nov. 16, 1993) (public benefit held only "slight" where litigation resulted in disclosure of information in electronic form that was previously publicly available in printed form).

[400] See, e.g., Fenster, 617 F.2d at 742-44 (fees denied to law firm which obtained disclosure of government auditor's manual used in reviewing contracts of the type entered into by firm's clients); Chamberlain v. Kurtz, 589 F.2d 827, 842-43 (5th Cir. 1979) (plaintiff who faced $1.8 million deficiency claim for back taxes and penalties "needed no additional incentive" to bring FOIA suit against IRS for documents relevant to his defense); Viacom Int'l v. EPA, No. 95-2243, 1996 U.S. Dist. LEXIS, at *6 (E.D. Pa. Aug. 30, 1996) (dismissing as "divorced from reality" corporation's contention that its "`knowing the extent of its potential liability will not promote any commercial interests'"); Frye, No. 90-3041, slip op. at 9 (D.D.C. Aug. 31, 1992) (fees denied where "plaintiff does not effectively dispute that the prime beneficiaries of the information requested will be commercial entities with commercial interests that either are, or might become, his clients"); Lyons v. OSHA, No. 88-1562, slip op. at 5 (D. Mass. Dec. 2, 1991) ("As a general rule, courts should not award fees if the requester is a large corporate interest."); Hill Tower, Inc. v. Department of the Navy, 718 F. Supp. 568, 572 (N.D. Tex. 1989) (plaintiff who had filed tort claims against government arising from aircraft crash "had a strong commercial interest in seeking [related] information [as] it was [its] antenna that was damaged by the crash"); Isometrics, Inc. v. Orr, No. 85-3066, slip op. at 9 (D.D.C. Feb. 27, 1987) (bidder's commercial benefit advanced considerably more than public interest when it received competitor's winning bid). But see Aronson, 866 F.2d at 3 ("potential for commercial personal gain did not negate the public interest served" by private tracer's lawsuit since "failure of HUD to comply reasonably with its reimbursement duty would probably only be disclosed by someone with a specific interest in ferreting out unpaid recipients").

[401] See, e.g., Polynesian Cultural Ctr., 600 F.2d at 1330 (attorney's fees award should not "`merely subsidize a matter of private concern' at taxpayer expense" (quoting Blue, 570 F.2d at 533-34)); Viacom, No. 95-2243, 1996 U.S. Dist. LEXIS, at *4 (E.D. Pa. Aug. 30, 1996) ("[W]e harbor strong doubts that Viacom entered into this proceeding to foster the public interest in disclosure. Its motivation, as evinced by its conduct of this litigation, was to assert its own interests as a potentially responsible party to the clean up operation."); Abernethy, 909 F. Supp. at 1569 (when plaintiff sought records of investigation of which he was target to challenge his removal from management position, "[p]laintiff's
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deed, it is "logical" to read the second and third factors together "where a private plaintiff has pursued a private interest."[402] To disqualify a fee applicant under the second and third factors, "a motive need not be strictly commercial; any private interest will do."[403] The use of the FOIA as a substitute for discovery has routinely been found to constitute a private, noncompensable interest.[404]

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[401](...continued)
strong personal motivation for filing this lawsuit outweighs any public interest which may result from disclosure"); Frydman, 852 F. Supp. at 1504 ("Although plaintiff's interest in the information in this case is not pecuniary, it is strictly personal."); Solone, 830 F. Supp. at 1143 (where plaintiffs sought information to help challenge IRS income calculations; plaintiffs' "private self-interest motive . . . is sufficient to insure the vindication of their rights under FOIA"); Frye, 90-3041, slip op. at 10 (D.D.C. Aug. 31, 1992) (where plaintiff was partner in environmental law firm, his "proffer that he frequently writes and lectures on environment[al] law without pay is insufficient to overshadow his obvious personal and pecuniary interest in his request"); Adams v. United States, 673 F. Supp. 1249, 1259 (S.D.N.Y. 1987)
(fees denied where "private self-interest motive" and "[potential] pecuniary benefit" to plaintiff were sufficient inducement to bring suit). But see Crooker, 776 F.2d at 368 (third factor found to favor plaintiff where "interest was neither commercial nor frivolous; instead his interest was to ensure that the Parole Commission relied on accurate information in making decisions affecting his liberty").

[402] Church of Scientology, 700 F.2d at 494; see Solone, 830 F. Supp. at 1143.

[403] Tax Analysts, 965 F.2d at 1095 ("`[P]laintiff was not motivated simply by altruistic instincts, but rather by its desire for efficient, easy access to [tax] decisions.'" (quoting Tax Analysts v. United States Dep't of Justice, 759 F. Supp. 28, 31 (D.D.C. 1991))); see Bangor Hydro-Electric, 903 F. Supp. at 171 (rejecting public utility's argument that it incurred no commercial benefit because under "`traditional regulatory principles'" utility would be obliged to pass any commercial gain on to its ratepayers; "[i]n passing that benefit on to its ratepayers, should Plaintiff do so, Plaintiff will simply be serving its clientele, in whom Plaintiff has a significant commercial interest"); Mosser Constr. Co. v. United States Dep't of Labor, No. 93CV7525, slip op. at 4 (N.D. Ohio Mar. 29, 1994) (factor weighs against not-for-profit organization whose actions are motivated by commercially related concerns on behalf of its members). But see Assembly of Cal., No. Civ-S-91-990, slip op. at 12 (E.D. Cal. May 28, 1993) (where state legislature sought information to challenge federal census count, fees not precluded by fact that benefits may thereby accrue to state in that "plaintiffs did not stand to personally benefit but acted as public servants").

[404] See, e.g., Ellis, 941 F. Supp. at 1079 (compiling cases); Muffoletto, 760 F. Supp. at 275 (rejecting plaintiff's entitlement to fees on grounds that "[t]he plaintiff's sole motivation in seeking the requested information was for discovery purposes, namely, to assist him in the defense of a private civil action"); Republic of New Afrika, 645 F. Supp. at 121 (purely personal motives of plaintiff--to
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However, "news interests should not be considered commercial interests."[405]

So crucial is the interaction between the public interest and the requester's private interest that it has led one court to bifurcate its fee award on the basis of a shifting of interests during the course of the FOIA lawsuit that led to the public disclosure of the requested documents.[406] The court denied any fees incurred during the initial three years of the lawsuit, during which time the plaintiff had sought the documents in furtherance of her state court tort action.[407] Thereafter, the documents were released to her in state court discovery, but subject to a protective order precluding public dissemination.[408] The court found that by continuing to seek to compel public disclosure of documents concerning a potential health hazard, the plaintiff became entitled to fees for the remainder of the FOIA litigation, based on the reasoning that her "secondary motivation during the initial period of the litigation, . . . became her primary motivation after the disputed documents were made available" to her on a restricted basis.[409]

The fourth factor counsels against a fee award when the agency "had a reasonable basis in law for concluding that the information in issue was exempt and that it had not been recalcitrant in its opposition to a valid claim or otherwise engaged in obdurate behavior."[410] In general, an agency's legal basis for

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[404](...continued)
exonerate its members of criminal charges and to circumvent civil discovery--dictated against award of fees); Simon v. United States, 587 F. Supp. 1029, 1033 (D.D.C. 1984) (use of FOIA as substitute for civil discovery "is not proper and this court will not encourage it by awarding fees"); Guam Contractors, 570 F. Supp. at 169 (fee award improper where plaintiff "used the FOIA as a `headstart' for discovery").

[405] S. Rep. No. 93-854, at 19 (1974), quoted in Fenster, 617 F.2d at 742 n.4, quoted in turn in Detroit Free Press, 73 F.3d at 98; accord FOIA Update, Winter/Spring 1987, at 10 ("New Fee Waiver Policy Guidance").

[406] Anderson, 80 F.3d at 1504-05.

[407] Id. at 1504.

[408] Id.; see Anderson v. HHS, No. 84C-861, slip op. at 3 (D. Utah Apr. 28, 1994), aff'd, 80 F.3d 1500 (10th Cir. 1996) ("Anderson eventually obtained copies of all the relevant documents . . . . However, the documents were subject to a protective order by the state court, prohibiting their disclosure to the public.").

[409] Anderson, 80 F.3d at 1504.

[410] Cuneo, 553 F.2d at 1365-66; see Tax Analysts, 965 F.2d at 1097 ("[T]he reasonableness-in-law factor is intended to weed out those cases in which the government was `recalcitrant in its opposition to a valid claim or otherwise engaged in obdurate behavior.'") (quoting Cuneo, 553 F.2d at 1365-66); Education/Instruccion, Inc. v. HUD, 649 F.2d 4, 8 (1st Cir. 1981) (government's withholding must "have `a colorable basis in law' and not appear designed
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withholding is "reasonable" if any pertinent authority exists to support the claimed exemption.[411] Even in the absence of supporting authority, withholding may also be "reasonable" where no precedent directly contradicts the agency's position.[412]

In an illustrative example, the D.C. Circuit has upheld a district court's finding of reasonableness in a case in which when there was "no clear precedent

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[410](...continued)
`merely to avoid embarrassment or to frustrate the requester'" (quoting S. Rep. No. 93-854, at 19)); LaSalle Extension Univ. v. FTC, 627 F.2d 481, 484-86 (D.C. Cir. 1980); Fenster, 617 F.2d at 744; Ellis, 941 F. Supp. at 1080 (government need show only "reasonable or colorable basis for the withholding" and that it has not engaged in recalcitrant or obdurate behavior); Solone, 830 F. Supp. at 1143 (government acted reasonably when agency had "at least a colorable basis in law for its decision to withhold" and there are no allegations of harassment of requester or avoidance of embarrassment by agency); Palmer v. Derwinski, No. 91-197, slip op. at 9-10 (E.D. Ky. June 10, 1992) ("[Agency] also exhibited good faith in providing substantially all of the requested documents, and in redacting only limited portions which were arguably subject to specific identifiable exemptions."); see also Blue, 570 F.2d at 534 (factor points in favor of fee award "if an agency's nondisclosure was designed to avoid embarrassment or thwart the requester").

[411] See Adams, 673 F. Supp. at 1259-60; see also Chesapeake Bay Found., 11 F.3d at 216 ("If the Government's position is founded on a colorable basis in law, that will be weighed along with other relevant considerations in the entitlement calculus."); American Commercial Barge Lines, 758 F.2d at 1112-14; Republic of New Afrika, 645 F. Supp. at 122. But see United Ass'n of Journeymen & Apprentices, Local 598 v. Department of the Army, 841 F.2d 1459, 1462-64 (9th Cir. 1988) (withholding held unreasonable where agency relied on one case that was "clearly distinguishable" and where "strong contrary authority [was] cited by the [plaintiff]"); Northwest Coalition, 965 F. Supp. at 64 (EPA decision "to rely solely on manufacturers' claims of confidentiality, rather than conduct more extensive questioning of the manufacturers' claims or make its own inquiry . . . was essentially a decision not to commit resources to questioning claims of confidentiality but instead to confront issues as they arise in litigation--and to pay attorneys' fees if EPA loses"); Core v. United States Postal Serv., No. 82-280-A, slip op. at 7 (E.D. Va. May 2, 1984) (agency's refusal to disclose information, contravening Department of Justice disclosure guidelines published in FOIA Update, held to raise "a question as to the reasonable basis in law" for withholding).

[412] See Frydman, 852 F. Supp. at 1504 ("Although the government did not offer case authority to support its position regarding the [records], we believe the government's position had a colorable basis. There is little, if any, case authority which directly holds contrary to the government's position.").

on the issue,"[413] even though the district court's decision in favor of the agency's withholding was reversed unanimously by the court of appeals (which decision, in turn, was affirmed by a near-unanimous decision of the United States Supreme Court[414]). Likewise, the mere fact that an agency forgoes an appeal on the merits of a case and complies with a district court disclosure order does not foreclose it from asserting the reasonableness of its original position in opposing a subsequent fee claim.[415] It should also be noted that when the delay in releasing records, rather than the agency's substantive claim of exemption, is challenged, this factor does not favor a fee award so long as the agency has not engaged in "obdurate behavior or bad faith."[416]

While these four factors have been routinely applied by courts in numerous cases, it has been observed that they are not necessarily the sole factors that may be considered.[417] Although no court has actually identified an additional factor, it

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[413] Tax Analysts, 965 F.2d at 1096-97.

[414] Tax Analysts v. Department of Justice, 492 U.S. 136 (1989).

[415] See Cotton, 63 F.3d at 1119.

[416] Ellis, 941 F. Supp. at 1080 (noting that agency was "in frequent contact with plaintiffs' counsel" and that "[d]ue to the scope of plaintiffs' request, some delay was inherent"); Republic of New Afrika, 645 F. Supp. at 122; see Smith v. United States, No. 95-1950, 1996 WL 696452, at *7 (E.D. La. Dec. 4, 1996) (finding that "[t]he government did not act with due diligence, and has offered no reason to find that the delay was `unavoidable[,]'" but holding in favor of government on this factor as "[t]he evidence in this case is that the Coast Guard's noncompliance was due to administrative ineptitude rather than any unwillingness to comply with [plaintiff's] FOIA request") (appeal pending); Frye, No. 90-3041, slip op. at 11-13 (D.D.C. Aug. 31, 1992) (although agency failed to adequately explain plaintiff's more than two-year wait for final response (such delay previously having been found "unreasonable" by court), agency's voluntary disclosure of documents two days before Vaughn Index deadline did not warrant finding of "obdurate" behavior absent affirmative evidence of bad faith); Alliance for Responsible CFC Policy, 631 F. Supp. at 1471; Simon, 587 F. Supp. at 1032 ("[W]ithout evidence of bad faith, the court declines to impose a fee award to sanction sluggish agency response."); Guam Contractors, 570 F. Supp. at 170; see also Frydman, 852 F. Supp. at 1508 (five-month delay during litigation in advising plaintiff of discovery of additional document does not establish bad faith). But see Miller v. United States Dep't of State, 779 F.2d 1378, 1390 (8th Cir. 1985) ("While these reasons [for delay] are plausible, and we do not find them to be evidence of bad faith . . . they are practical explanations, not reasonable legal bases."); United Merchants & Mfrs. v. Meese, No. 87-3367, slip op. at 3 (D.D.C. Aug. 10, 1988) (unnecessary for plaintiff to show "that defendant was obdurate in order to prevail" where there was "no reasonable basis for defendant to have failed to process plaintiff's [FOIA request] for nearly a year").

[417] See, e.g., American Commercial Barge Lines, 758 F.2d at 1111 ("at least (continued...)

appears that--without expressly acknowledging it--the D.C. Circuit may, in fact, have applied such a criterion in one recent instance.[418] In reviewing whether the requester was eligible for fees in a case involving a highly unusual fact pattern,[419] the D.C. Circuit found that when the government disclosed records during the litigation, "[i]f the Government was right in claiming that the data were exempt from disclosure under FOIA, then no fees are recoverable."[420]

On the other hand, the D.C. Circuit also has made clear that a decision to deny fees need not always address all four factors.[421] In Cotton v. Heyman, having concluded that there was no cognizable public benefit and that the agency's stance had been reasonable, it dispensed with any review of the "plaintiff's interest" or "commercial benefit" factors, presumably on the premise that these factors could only further undermine, not bolster, the fee application in that case.[422]

If a court decides to make a fee award, its next task is to determine an appropriate fee amount, based upon attorney time shown to have been reasonably expended. While hours expended should be supported by contemporaneous records, in some (but not all) jurisdictions "a court may award an attorney's fee based on a reconstructed record."[423] However, even where reconstructed records

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[417](...continued)
the following factors should be considered in determining whether a prevailing FOIA complainant should be awarded attorney fees"); LaSalle Extension Univ., 627 F.2d at 483 (four factors are "a minimum that a district court should consider in deciding whether to grant a FOIA attorneys' fees claim"); Nationwide Bldg., 559 F.2d at 711 (omission of four factors from statutory language was "to avoid limiting the court to these four factors"); Vermont Low Income, 546 F.2d at 513 ("The detailed list of criteria governing a court's discretion which the Senate bill had contained was eliminated not because the conferees disagreed with it but because they regarded it as `too delimiting' and `unnecessary.'") (analyzing legislative history); see also Lovell, 589 F. Supp. at 153 ("entitlement turns on a number of factors including" traditional four factors).

[418] Chesapeake Bay Found., 11 F.3d at 216.

[419] See id. at 212-15 (after government's gratuitous offer to survey submitters of exempt information for objections to disclosure was declined by plaintiffs, district court ordered government to undertake such step and all records ultimately were released).

[420] Id. at 216; see also Cotton, 63 F.3d at 1117.

[421] See Cotton, 63 F.3d at 1123.

[422] Id.

[423] Anderson, 80 F.3d at 1506. But see Ajluni v. FBI, No. 94-CV-325, 1997 WL 196047, at *2 (N.D.N.Y. Apr. 14, 1997) ("Moreover, `[t]he rule in this Circuit prohibits the submission of reconstructed records, where no contem-
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are not entirely barred, a district court retains discretion to "totally deny a claim when no contemporaneous records were kept."[424]

The starting point in setting a fee award is to multiply the number of hours reasonably expended by a reasonable hourly rate--a calculation which yields what is termed the "lodestar" fee amount.[425] Not all hours expended will be deemed to have been "reasonably" expended. For example, courts have directed attorneys to subtract hours spent litigating claims upon which the party seeking the fee did not ultimately prevail.[426] In such a case, a distinction has been made between a loss on a legal theory where "the issue was all part and parcel of one [ultimately successful] matter,"[427] and a rejected claim that is "truly fractionable" from the successful claim.[428] In one case, though, when the plaintiff's numerous claims

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[423](...continued)
poraneous records have been kept.'" (quoting Lenihan v. City of New York, 640 F. Supp. 822, 824 (S.D.N.Y. 1986))).

[424] Anderson, 80 F.3d at 1506 (dicta).

[425] See Hensley v. Eckerhart, 461 U.S. 424, 433 (1982) (civil rights case); Copeland v. Marshall, 641 F.2d 880, 891 (D.C. Cir. 1980) (en banc) (Title VII case).

[426] See, e.g., Hensley, 461 U.S. at 434-40; Anderson, 80 F.3d at 1506; Copeland, 641 F.2d at 891-92; Ajluni, 947 F. Supp. at 611 (fees limited to those incurred up to point at which "the last of the additional documents were released"); McDonnell, 870 F. Supp. at 589.

[427] Copeland, 641 F.2d at 892 n.18; see National Ass'n of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319, 1327 n.13 (D.C. Cir. 1982) (as modified); National Ass'n of Atomic Veterans, Inc. v. Director, Defense Nuclear Agency, No. 81-2662, slip op. at 7 (D.D.C. July 15, 1987) (because plaintiff "clearly prevailed" on its only claim for relief, it is "entitled to recover fees for time expended on the few motions upon which it did not prevail").

[428] See, e.g., Weisberg v. Webster, No. 78-322, slip op. at 3 (D.D.C. June 13, 1985); Newport Aeronautical Sales, No. 84-120, slip op. at 10-11 (D.D.C. Apr. 17, 1985); see also Weisberg, 745 F.2d at 1499 (no award for issues on which plaintiff did "not ultimately prevail" and for "non-productive time"); Steenland v. CIA, 555 F. Supp. 907, 911 (W.D.N.Y. 1983) (award for work performed after release of records, where all claims of exemptions subsequently upheld, "would assess a penalty against defendants which is clearly unwarranted"); Agee v. CIA, No. 79-2788, slip op. at 1 (D.D.C. Nov. 3, 1982) ("plaintiff is not entitled to fees covering work where he did not substantially prevail"); Dubin v. Department of the Treasury, 555 F. Supp. 408, 413 (N.D. Ga. 1981) (fees awarded "should not include fees for plaintiffs' counsel for their efforts after the release of documents by the Government . . . since they failed to prevail on their claims at trial"), aff'd, 697 F.2d 1093 (11th Cir. 1983) (unpublished table decision); cf. Anderson, 80 F.3d at 1504 (affirming district court's denial of fees for portion of lawsuit during which plaintiff's primary motivation was her personal interest, while allowing
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were so intertwined that the court could discern "no principled basis for eliminating specific hours from the fee award," the court employed a "general reduction method," allowing only a percentage of fees commensurate with the estimated degree to which that plaintiff had prevailed.[429]

Additionally, prevailing plaintiffs are obligated to exercise sound billing judgment; the Supreme Court has emphasized that "[c]ounsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary."[430] It should be remembered, however, that where attorney fees are awarded, the hours expended by the plaintiff pursuing the fee award also are ordinarily compensable.[431]

Courts will accept affidavits from local attorneys to support hourly rates, but they should be couched in terms of specific market rates for particular types of litigation and they must be well documented.[432] It has been observed that "[t]he pertinent legal market, for purposes of calculating legal fees, is the jurisdiction in which the district court sits . . . ."[433] The most recent articulation of the proper rate standard, at least within the D.C. Circuit, was set forth in Save our Cumberland Mountains, Inc. v. Hodel,[434] which, in overruling an earlier such

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[428](...continued)
fees for remainder of suit when public interest was paramount motivation). But see Badhwar v. United States Dep't of the Air Force, No. 84-154, slip op. at 3 (D.D.C. Dec. 11, 1986) ("[D]efendants' attempts to decrease [fees] on the grounds that the plaintiffs did not prevail as to all issues raised . . . are not persuasive. [The FOIA] requires only that the plaintiff should have `substantially prevailed.'").

[429] McDonnell, 870 F. Supp. at 589 (reducing plaintiff's requested award by 60%; "[w]hile plaintiff has obtained substantial relief through his litigation, there can be no gainsaying that the amount of relief denied was greater than that awarded").

[430] Hensley, 461 U.S. at 434, quoted in Assembly of Cal., No. Civ-S-91-990, slip op. at 26 (E.D. Cal. May 28, 1993); see City of Detroit, No. 93-CV-72310, slip op. at 3-4 (E.D. Mich. Mar. 24, 1995) (60% reduction of requested fees appropriate because city employed eight attorneys when two would have sufficed, utilized two principal litigators when one would have sufficed, and generated nearly half of all fees sought in connection with its fees petition).

[431] See Copeland, 641 F.2d at 896; see also Assembly of Cal., No. Civ-S-91-990, slip op. at 37-39 (E.D. Cal. May 28, 1993); Katz v. Webster, No. 82-1092, slip op. at 4-5 (S.D.N.Y. Feb. 1, 1990).

[432] See National Ass'n of Concerned Veterans, 675 F.2d at 1325.

[433] Northwest Coalition, 965 F. Supp. at 65.

[434] 857 F.2d 1516 (D.C. Cir. 1988) (en banc) (Surface Mining Control and Reclamation Act case).

decision in Laffey v. Northwest Airlines, Inc.,[435] held that the "prevailing market rate method heretofore used in awarding fees to traditional for-profit firms and public interest legal services organizations shall apply as well to those attorneys who practice privately and for profit, but at reduced rates reflecting non-economic goals."[436] It should be noted that when a case is in litigation for a prolonged period of time, "[a]ttorneys' fees awarded against the United States must be based on the prevailing market rates at the time the services were performed, rather than rates current at the time of the award."[437]

The lodestar calculation is strongly presumed to yield the reasonable fee.[438] Indeed, the Supreme Court has placed stringent limitations on the availability of any fee "enhancement" (sometimes termed a "multiplier") above the lodestar figure, based upon the quality of representation and the results obtained.[439] Except in Powell v. Department of Justice,[440] a quality enhancement has never been awarded in a FOIA case.[441]

Although it previously has been held that a fee enhancement as compensation for the risk in a contingency fee arrangement might be available in FOIA cases,[442] the Supreme Court has now clarified that such enhancements are not

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[435] 746 F.2d 4 (D.C. Cir. 1984).

[436] 857 F.2d at 1524.

[437] Northwest Coalition, 965 F. Supp. at 66 ("Contrary to plaintiffs' assertions, it is not proper to adjust historic rates to take inflation into account." (citing Library of Congress v. Shaw, 478 U.S. 310, 322 (1986))).

[438] See Pennsylvania v. Delaware Valley Citizens' Counsel for Clean Air, 478 U.S. 546, 564-65 (1985) [hereinafter Delaware Valley I] (Clean Air Act case); Blum v. Stenson, 465 U.S. 886, 897 (1984) (civil rights case).

[439] See Delaware Valley I, 478 U.S. at 565 (quality enhancements appropriate "only in certain `rare' and `exceptional' cases, where supported by `specific evidence' on the record and detailed findings by the lower courts" (quoting Blum, 465 U.S. at 898-901)).

[440] No. C-82-326, slip op. at 22-23 (N.D. Cal. Sept. 19, 1985) (pre-Delaware Valley I decision awarding fee enhancement based upon "superior representation").

[441] See, e.g., National Ass'n of Atomic Veterans, No. 81-2662, slip op. at 12-13 (D.D.C. July 15, 1987) (fee applicant bears "heavy burden of proof" to justify quality enhancement; court "not convinced that this is the `rare or exceptional' case where an upward adjustment is appropriate" (quoting Murray v. Weinberger, 741 F.2d 1423, 1428 (D.C. Cir. 1984))); Newport Aeronautical Sales, No. 84-120, slip op. at 17 (D.D.C. Apr. 17, 1985) ("Blum v. Stenson makes clear that only the most exceptional cases will warrant an increase to the lodestar.").

[442] See, e.g., Weisberg, 848 F.2d at 1272 (ruling that two-part test fashioned in (continued...)

available under statutes authorizing an award of attorney fees to a "prevailing or substantially prevailing party," such as the FOIA.[443]

While "interim" attorney fees may be sought before the conclusion of a suit,[444] a majority of courts have declined to award them, absent extenuating circumstances, due to the inefficient and "piecemeal" nature of such relief.[445] When

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[442](...continued)
Justice O'Connor's concurring opinion in Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 483 U.S. 711, 731-34 (1987), is applicable to FOIA cases); Allen v. FBI, 751 F. Supp. 255, 256 (D.D.C. 1990) (100% fee enhancement awarded in FOIA case); see also McKenzie v. Kennickell, 875 F.2d 330, 334 (D.C. Cir. 1989) (Title VII case).

[443] City of Burlington, 505 U.S. at 562 (prohibiting contingency enhancement in environmental fee-shifting statutes and noting that case law "construing what is a `reasonable' fee applies uniformly to all [federal fee-shifting statutes]"); see also King v. Palmer, 950 F.2d 771, 775 (D.C. Cir. 1991) (en banc) (pre-City of Burlington Title VII contingency enhancement case which anticipated result later reached by Supreme Court).

[444] See Rosenfeld v. United States, 859 F.2d 717, 723-27 (9th Cir. 1988); Washington Post, 789 F. Supp. at 424-25; Allen v. DOD, 713 F. Supp. 7, 11-12 (D.D.C. 1989).

[445] See, e.g., Irons v. FBI, No. 82-1143-G, slip op. at 9-10 (D. Mass. June 26, 1987) (no interim fees where government has not "resisted actively, or through egregious delay, compliance with a proper document request"); Shanmugadhasan v. Arms Control & Disarmament Agency, No. 84-3033, slip op. at 2 (D.D.C. Aug. 9, 1985) (interim fees denied as "premature"); Hydron Lab., Inc. v. EPA, 560 F. Supp. 718, 722 (D.R.I. 1983) (refusing to deal "piecemeal" with questions concerning entitlement to attorney fees); Letelier v. United States Dep't of Justice, 1 Gov't Disclosure Serv. (P-H) ¶ 80,252, at 80,631 (D.D.C. Oct. 2, 1980) (interim award "would likely result in duplication of effort, as fees might be requested at successive stages"); Biberman v. FBI, 496 F. Supp. 263, 265 (S.D.N.Y. 1980) (interim fees are exceptional and "because of the inefficiency of such a procedure, such an award ought to be made only in those cases in which it is necessary to the continuance of the litigation which has proven to be meritorious at the time of the application"). But see Allen, 713 F.2d at 12-13 (awarding interim fees, but only "for work leading toward the threshold release of non-exempt documents" and holding that "[a]ny claims for fees resulting from a dispute over the applicability of a particular exemption to specific documents (a phase two dispute) would only be cognizable at the end of the litigation"); Wilson, No. 87-2415, slip op. at 3 (D.D.C. Sept. 12, 1989) (interim fees awarded "for time spent addressing the fee waiver question" on which plaintiff prevailed); Allen v. FBI, 716 F. Supp. 667, 669-72 (D.D.C. 1989) (awarding interim fees for work leading toward "first phase" release of nonexempt documents, but declining to award them as to all such documents not yet released); Powell v. United States Dep't of Justice, 569 F. Supp. 1192, 1200 (N.D. Cal. 1983) (four factors to be considered in court's dis-
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interim fees are approved, however, payment of the fees need not await the final judgment in the action.[446] It should also be noted that where all substantive legal issues have been resolved by the district court, the mere pendency of an application for fees does not preclude appellate review of the district court's decision on the merits.[447]

Finally, it should be noted that in a case decided under Title VII, but logically applicable to the FOIA as well, the Supreme Court has held that, absent an express waiver, a private party cannot recover interest against the federal government.[448] Indeed, a fee enhancement to compensate counsel for delay in receiving fees was deemed "interest" and, accordingly, was denied in Weisberg v. Department of Justice.[449]

Sanctions

Although the FOIA does not authorize any award of monetary damages to a requester,[450] either for an agency's unjustified refusal to release requested records,[451] or for allegedly improper disclosure of information,[452] the Act does

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[445](...continued)
cretion for award of interim fees: degree of hardship on plaintiff and counsel; existence of unreasonable delay by agency; length of time case already pending; and length of time before litigation is concluded).

[446] See Rosenfeld, 859 F.2d at 727; Washington Post, 789 F. Supp. at 425.

[447] See McDonnell v. United States, 4 F.3d 1227, 1236 (3d Cir. 1993) ("Even if a motion for attorney's fees is still pending in the district court, that motion does not constitute a bar to our exercise of jurisdiction under § 1291." (citing Budinich v. Becton Dickinson & Co., 486 U.S. 196, 198-202 (1988))); see also Anderson v. HHS, 3 F.3d 1383, 1385 (10th Cir. 1993) ("`We think it indisputable that a claim for attorney's fees is not part of the merits of the action to which the fees pertain.'" (quoting Budinich, 486 U.S. at 200)).

[448] Library of Congress, 478 U.S. at 314.

[449] 848 F.2d at 1272.

[450] See Butler v. Nelson, No. 96-48, slip op. at 8-9 (D. Mont. May 16, 1997) ("Section 552 of Title 5 includes a comprehensive and defined list of remedies available; the conspicuous absence of a provision allowing an action for money damages convinces the court that Plaintiff may not seek damages under the FOIA."); Stabasefski v. United States, 919 F. Supp. 1570, 1573 (M.D. Ga. 1996) ("[T]he remedial measures available under the Freedom of Information Act are limited to injunctive relief, costs, and attorney's fees." (citing 5 U.S.C. § 552(a)(4)(B), (E) (1994))).

[451] See Schwartz v. United States Patent & Trademark Office, No. 95-5349, 1996 U.S. App. LEXIS 4609, at **2-3 (D.C. Cir. Feb. 22, 1996); Thompson v. Walbran, 990 F.2d 403, 405 (8th Cir. 1993); Wren v. Harris, 675 F.2d 1144, 1147 (continued...)

provide that, in certain narrowly prescribed circumstances, agency employees who act arbitrarily or capriciously in withholding information may be subject to disciplinary action. Subsection (a)(4)(F) of the FOIA, as amended, provides:

> Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the [United States Office of] Special Counsel[453] shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding.[454]

Thus, there are three distinct jurisdictional prerequisites to the commencement of a Special Counsel investigation under the FOIA: (1) the court must order the production of agency records found to be improperly withheld; (2) it must award attorney fees and litigation costs; and (3) it must issue a specific "written

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[451](...continued)
(10th Cir. 1982); Kuffel v. United States Bureau of Prisons, 882 F. Supp. 1116, 1127 (D.D.C. 1995); Gilbert v. Social Sec. Admin., No. 93-C-1055, slip op. at 10 (E.D. Wis. Dec. 28, 1994); Bologna v. Department of the Treasury, No. 93-1495, slip op. at 8-9 (D.N.J. Mar. 29, 1994); Duffy v. United States, No. 87-C-10826, slip op. at 31-32 (N.D. Ill. May 29, 1991); Daniels v. St. Louis Veterans Admin. Reg'l Office, 561 F. Supp. 250, 251 (E.D. Mo. 1983); Diamond v. FBI, 532 F. Supp. 216, 233 (S.D.N.Y. 1981), aff'd on other grounds, 707 F.2d 75 (2d Cir. 1983).

[452] See Crumpton v. Stone, 59 F.3d 1400, 1406 (D.C. Cir. 1995) (agency decision to disclose information under FOIA constitutes "a discretionary function exempt from suit under the [Federal Tort Claims Act]"), cert. denied, 116 S. Ct. 1018 (1996); Sterling v. United States, 798 F. Supp. 47, 48 & n.2 (D.D.C. 1992) (neither FOIA nor Administrative Procedure Act authorizes award of monetary damages for alleged improper disclosure), summary affirmance granted, No. 93-5264 (D.C. Cir. Mar. 11, 1994).

[453] See 5 U.S.C. § 1211 (1994) (establishing "Office of Special Counsel" independent of Merit Systems Protection Board).

[454] 5 U.S.C. § 552(a)(4)(F) (1994), as amended by Electronic Freedom of Information Act Amendments of 1996, 5 U.S.C.A. § 552 (West Supp. 1997); see also President's Memorandum for Heads of Departments and Agencies regarding the Freedom of Information Act, 29 Weekly Comp. Pres. Doc. 1999 (Oct. 4, 1993), reprinted in FOIA Update, Summer/Fall 1993, at 3 (emphasizing that "unnecessary bureaucratic hurdles [have] no place in [FOIA's] implementation").

finding" of suspected arbitrary or capricious conduct.[455] In one case, Miller v. Webster, it was found that the circumstances surrounding the withholding of small portions of three documents did "suggest that the agency decision was arbitrary and capricious."[456] Despite having ordered disclosure of this information and awarding attorney fees, the court refused to refer the "alleged violation" to the Merit Systems Protection Board, citing the common law maxim of "de minimis non curat lex" (the law takes no notice of trifling matters).[457] Nevertheless, the viability and importance of this sanction provision should not be overlooked by agency FOIA personnel.[458]

Additionally, the Office of Special Counsel is authorized by a provision of the Whistleblower Protection Act of 1989 to investigate certain allegations concerning arbitrary or capricious withholding of information requested under the FOIA.[459] A significant distinction between this provision and subsection (a)(4)(F) of the FOIA is that the former does not require a judicial finding--indeed, no lawsuit need even be filed to invoke this other sanction procedure.[460]

Finally, as in all civil cases, courts may exercise their discretion to impose sanctions on FOIA litigants and government counsel who have violated court

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[455] See, e.g., Simon v. United States Dep't of Labor, No. 83-3780, slip op. at 2-3 (D.D.C. Mar. 21, 1984) (court refused to issue "sanctions" finding when all requested records had been produced in their entireties, because it could not order production of any records); Emery v. Laise, 421 F. Supp. 91, 93 (D.D.C. 1976) (same), aff'd sub nom. Emery v. Reinhardt, 566 F.2d 797 (D.C. Cir. 1977); see also Wilder v. IRS, 601 F. Supp. 241, 243 (M.D. Ala. 1984) (although disclosure delayed, no sanctions imposed because all material released); Idaho Wildlife Fed'n v. Forest Serv., 3 Gov't Disclosure Serv. (P-H) ¶ 83,271, at 84,058 (D.D.C. July 21, 1983) (no sanctions where agency records not improperly withheld); Norwood v. FAA, No. 83-2315, slip op. at 20 (W.D. Tenn. Dec. 11, 1991) (when court denies fees on ground that plaintiff is pro se, "the issuance of written findings pursuant to 5 U.S.C. § 552(a)(4)(F) would be inappropriate since both prerequisites have not been met"), aff'd in part & rev'd in part on other grounds, 993 F.2d 570 (6th Cir. 1993). But see Ray v. United States Dep't of Justice, 716 F. Supp. 1449, 1451-52 (S.D. Fla. 1989) ("court order" requirement held satisfied even though no record found to be improperly withheld).

[456] No. 77-C-3331, slip op. at 4 (N.D. Ill. Oct. 27, 1983), summary judgment granted (N.D. Ill. Feb. 29, 1984).

[457] Id. at 4.

[458] See FOIA Update, Summer 1983, at 5.

[459] 5 U.S.C. § 1216(a)(3) (1994).

[460] See H.R. Rep. No. 95-1717, at 137 (1978), reprinted in 1978 U.S.C.C.A.N. 2723, 2870 ("[T]his provision is not intended to require that an administrative or court decision be rendered concerning withholding of information before the Special Counsel may investigate allegations of such a prohibited practice.").

rules or shown disrespect for the judicial process.[461] Claims of "bad faith" actions by the government agency itself, however, are more properly considered in administrative proceedings or in determinations of whether to grant attorney fees.[462]

In determining whether to impose sanctions on plaintiffs, district courts review the number and content of court filings and their effect on the courts as indicia of frivolousness or harassment.[463] For example, as a sanction under Rule 11 of the Federal Rules of Civil Procedure, a frequent FOIA requester who filed more than forty-nine FOIA lawsuits over eight years and who routinely failed to oppose motions to dismiss, was ordered to show cause in any subsequent lawsuit why the principle of res judicata did not bar the intended suit.[464] As a general

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[461] See, e.g., Voinche v. CIA, No. 96-31270, slip op. at 2 (5th Cir. June 18, 1997) (cautioning plaintiff that "future frivolous appeals will invite the imposition of sanctions"), petition for cert. filed, 66 U.S.L.W. 3137 (U.S. July 21, 1997) (No. 97-257); Schanen v. United States Dep't of Justice, 798 F.2d 348, 350 (9th Cir. 1986) (although exemption claims ultimately upheld, government ordered to pay plaintiff's attorney fees and costs due to government counsel's failure to competently defend claims); Oklahoma Publ'g Co. v. HUD, No. 87-1935-P, slip op. at 7 (W.D. Okla. June 17, 1988) (attorney fees assessed against government when counsel failed to comply with scheduling and disclosure orders); Hill v. Department of the Air Force, No. 85-1485, slip op. at 7 (D.N.M. Sept. 4, 1987) (because of unreasonable delay in processing FOIA request, documents ordered processed at no further cost to plaintiff), aff'd on other grounds, 844 F.2d 1407 (10th Cir. 1988); see also Van Bourg, Allen, Weinberg & Roger v. NLRB, 762 F.2d 831, 833 (9th Cir. 1985) (warning that sanctions will be imposed if plaintiff's counsel again "fails to inform us about material facts or procrastinates in obeying our orders"); Salman v. Secretary of the Treasury, No. CV-N-96-296, slip op. at 4-7 (D. Nev. Jan. 2, 1997) (after receiving prior warning against filing frivolous lawsuits, plaintiff ordered to show cause why he should not be sanctioned under Rule 11 of Federal Rules of Civil Procedure); cf. Center for Nat'l Sec. Studies v. INS, No. 87-2068, slip op. at 2 (D.D.C. July 27, 1988) (discovery ordered against government for failure to comply with previous estimates of processing time and to explain discrepancies in time estimates).

[462] See Ellis v. United States, 941 F. Supp. 1068, 1081 (D. Utah. 1996).

[463] See, e.g., Goldgar v. Office of Admin., 26 F.3d 32, 35-36 & n.3 (5th Cir. 1994) (warning plaintiff that subsequent filing or appeal of FOIA lawsuits without jurisdictional basis may result in assessment of costs, attorney's fees and proper sanctions or that plaintiff may be required to "obtain judicial preapproval of all future filings"); In re Powell, 851 F.2d 427, 431-34 (D.C. Cir. 1988) (per curiam); Wrenn v. Gallegos, No. 92-3358, slip op. at 1-2 (D.D.C. May 26, 1994) (plaintiff's future filings barred absent prior leave of court when plaintiff "has been adjudicated a vexatious litigant in several other forums and remains so in this court").

[464] Crooker v. United States Marshals Serv., 641 F. Supp. 1141, 1143 (D.D.C.
(continued...)

rule, however, "mere litigiousness alone does not support the issuance of an injunction" against filing further lawsuits.[465]

It should additionally be noted, however, that in the case of a litigant who is incarcerated, a federal statute now provides that an action in forma pauperis cannot be filed by any such prisoner who, on three or more prior occasions while incarcerated, "brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted."[466] Although this statute applies only to suits that have been brought in federal court, it applies both to federal

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[464](...continued)
1986); see Crooker v. ATF, No. 96-01790, slip op. at 1-2 (D.D.C. Nov. 22, 1996) (dismissing complaint for failure to comply with requirements of Crooker v. United States Marshals Serv.).

[465] In re Powell, 851 F.2d at 434; cf. Zemansky v. EPA, 767 F.2d 569, 573-74 (9th Cir. 1995) (district court exceeded its authority by requiring frequent requester, whose requests included "questions, commentary, narrative" and other extraneous material, to make future requests in "`separate document which is clearly defined as an FOIA request' and not `intertwined with non-FOIA matters'"). But see Hunsberger v. United States Dep't of Energy, No. 96-0455, slip op. at 2 (D.D.C. Mar. 14, 1996) (enjoining plaintiff from filing any further civil actions without first obtaining leave of court because "[p]laintiff's numerous actions have demanded countless hours from this Court").

[466] 28 U.S.C.A. § 1915(g) (West Supp. 1997).